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No. 1196

IN THE SUPREME COURT OF THE UNITED STATES

*****

BILLY RAY VENABLE,
Appellant,

v.

THE STATE OF TEXAS,
Appellee.

*****

APPEAL FROM THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS AT AUSTIN, TEXAS

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JURISDICTIONAL STATEMENT

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Attorney for Appellant

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1965
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BILLY RAY VENABLE,
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APPEAL FROM THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS AT AUSTIN, TEXAS

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JURISDICTIONAL STATEMENT

Appellant appeals from a judgment of conviction of the County Criminal Court No. 3 of Dallas County, Texas rendered on February 18, 1965. Appellant submits this Jurisdictional Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The Findings of the Court of the County Criminal Court No. 3 of Dallas County, Texas are to be found, quoted in their entirety, in the opinion by Judge Woodley of the Court of Criminal Appeals of the State of Texas reported in 397 S.W.2d 231 a copy of which is appended hereto as Appendix A.

JURISDICTION

Appellant was convicted of the misdemeanor offense of driving while intoxicated under Article 802, Texas Penal Code. Punishment was assessed at three (3) days confinement in the Dallas County Jail and a fine of seventy five dollars, ($75.00). This judgment of conviction rendered on February 18, 1965 by the County Criminal Court No. 3 of Dallas County, Texas was later affirmed in an opinion delivered November 17, 1965, by the Court of Criminal Appeals of the State of Texas at Austin, Texas. A motion for rehearing was overruled, without written opinion on January 12, 1966, thus making the judgment final. Notice of appeal was filed in that court on January 24, 1966.

This appeal is brought for the purpose of enjoining the enforcement of that judgment of conviction rendered as a result of the invalid (as applied) aforementioned statute. The statute (as applied) is invalid because it is repugnant to the Federal Constitution. The jurisdiction of the Supreme Court of the United States to hear this appeal rests upon Title 28, United States Code,

Section 1257 (2). The following decisions serve to sustain the jurisdiction of the Supreme Court to review this case on direct appeal: Myles Salt Co. v. Iberia & St. M. Drainage District, 239 U.S. 478; Dahnke-Walker Milling Co., v. Bondurant, 257 U.S. 282; Lawrence v. State Tax Commission, 286 U.S. 276, 282-3.

STATUTE INVOLVED

The statute, Article 802, Texas Penal Code is found in: Volume 2, Vernon's Anno. Penal Code, page 317, and quoted verbatim as follows:

Art. 802. Driver intoxicated or under influence of intoxicating liquor

Any person who drives or operates an automobile or any other motor vehicle upon any public road or highway in this State, or upon any street or alley within the limits of an incorporated city, town or village, while such person is intoxicated or under the influence of intoxicating liquor, shall be guilty of a misdemeanor and upon conviction shall be punished by confinement in the county jail for not less than three (3) days nor more than two (2) years, and by a fine of not less than Fifty ($50.00) Dollars nor more than Five Hundred ($500.00) Dollars. Provided, however, that the presiding judge in such cases at his discretion may commute said jail sentence to a probation period of not less than six (6) months.

QUESTION PRESENTED

Whether the owner of a motor vehicle, who was neither driving nor operating it, can be validly convicted, on the theory of principals, of the misdemeanor offense under the terms of a statute proscribing driving while under the influence of intoxicating liquor, without such an application of statute being repugnant to the Federal Constitutional requirements of notice under the Sixth Amendment thereto, and of due process of law under the Fourteenth Amendment thereto.

STATEMENT

The case was tried before the Court without a jury.

The State presented a case showing that the appellant was driving the vehicle at the time in question and while under the influence of intoxicating liquor, a violation of Art. 802, supra.

The appellant defended on the ground that he was not driving the vehicle and therefor was innocent of the violation accused.

The Court found that the appellant was not driving, but, because of his ownership of the vehicle, his presence and implied consent, was guilty in any event on the theory of principals.

Appellant objected and excepted to his conviction on such a theory and raised its repugnancy to the Federal Constitution , for the first time, on appeal,having had no prior opportunity. Such an application of the aforementioned statute is invalid in the opinion of the appellant.

THE QUESTIONS ARE SUBSTANTIAL

The due process requirement of definiteness is especially important in its application to penal and criminal statutes. The legislature, in the exercise of its power to declare what shall constitute a crime or punishable conduct, has a duty to, and must inform our citizens and others, with reasonable precision, what acts it intends to prohibit, so that anyone may have a certain understandable rule of conduct and know what acts it is his duty to avoid.

In the instant case, the statute can be characterized as proscribing a "malum prohibitum". This, because it has no requirement of "criminality", scienter or knowledge; Duncan v. Commonwealth, 289 Ky. 231, 158 S.W.2d 396, 398. Statutes, "malum prohibitum", without this requirement do not admit inferences of implied statutory intent to proscribe conduct or acts other than those expressly defined by the statute itself; People v. Boxer, 24 N.Y.S.2d 628, 632; this because the conduct proscribed is always, but for the statute, lawful. State v. Trent, 122 Or. 444, 259 P. 893, 898; People v. Herbert, 6 Cal. 2d 541, 58 P.2d 909, 912. For this reason such a statute should not be used to proscribe conduct which is "malum in se", nor should such a statute admit the operation of the theory of principals, as these both are by their very nature and origins, "creatures" of criminal intent.

The substantialness of the case at bar which requires the plenary consideration of the Supreme Court, with briefs and oral argument, springs from two main sources.

The first is that the instant statute, as do some of other jurisdictions, couches the prohibited act in contradictory terms; i.e., "intoxicated", which is "malum in se" and, "under the influence of intoxicating liquor", which is "malum prohibitum"; State v. Budge, 126 Me. 223, 137 A. 244. This, without further, is repugnant of the Federal Constitutional requirement of definiteness; when a criminal statute fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by statute.

Secondly, the constitutional vice, in a vague or indefinite statute, or an application thereof, is the injustice in placing a person on trial for an offense of whose nature he was given no fair warning. This is especially true of misdemeanor offenses, as here. In these, the law makes no distinction as to accomplices or accessories, all are charged as principals and with the commission of the act itself. If then we assume that an imprudent roadhouse bartender serves "one too many" to a traveler, he might well find himself subsequently charged with the offense of "driving while intoxicated". The injustice, lying in that the offense charged occurred at a place he had never visited and at such a time of day that he knew he could prove he was working behind his bar; the very elements of his guilt.

If it is desireable to proscribe such conduct, it would seem a legislative prerogative rather than by an unconstitutional enlargement of the theory of principals.

I believe that the questions presented by this appeal are substantial and because they affect the everyday conduct of all persons, they are of public importance and worthy of consideration by the Supreme Court of the United States.

Respectfully submitted.

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CERTIFICATE OF SERVICE

It is hereby certified that service of this Jurisdictional Statement, in accordance with Rule 33 (3) of the Rules of the Supreme Court of the United States, has been made by postage prepaid upon Honorable Leon Douglas, State's Attorney, Austin, Texas and Honorable Henry Wade, Criminal District Attorney Dallas County, Texas

Dated this 23rd day of March, 1966.

Adelfa B. Callejo

Adelfa B. Callejo (Mrs.)
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902 Fidelity Union Life Blg.
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APPENDIX A

Billy Ray Venable, Appellant

v.

The State of Texas, Appellee

No. 38574

Court of Criminal Appeals of Texas.

Nov. 17, 1965.

Rehearing Denied Jan. 12, 1966.

WOODLEY, Judge.

The offense is drunk driving; the punishment, 3 days in jail and a fine of $75.

Trial was before the court upon a plea of not guilty.

At the conclusion of the case the trial judge made the following findings:

"At the end of the State's case the defense made a motion to find him not guilty on the part of the Court which the Court overruled. At that time the Court had heard three officers who testified in their opinion the Defend-

ant was intoxicated to a certain degree. Officer Apple with five years experience, Officer Schafer with about ten years and Officer Livingston with about nine years, Officers Schafer and Livingston being the arresting officers. They testified as to the erratic driving of the car, about it sliding around the corner there and about it going around that other corner and hitting that concrete culvert and going into the ditch. At that time the circumstances were sufficient for the Court to overrule the motion of not guilty. Later the Defendant testified he was not driving the car and testified he met this man Williams down at the tavern. He said he had two or three beers down there and Williams testified he had six or eight. The Defendant said he was suspicious of Williams to start with and he was wondering about Williams driving the car. Now, when you get down to circumstantial evidence, it's possible they could have changed drivers at the scene of the accident. It was dark and the officers got there shortly afterwards and the car was tilted and they could have swapped places. On the other hand the Court finds that the Defendant knew that Williams had six or eight beers and was under the influence of intoxicating liquors and permitted him to drive that car on a public street and highway in Dallas County, Texas, on the date in question.

"The Court will hold as in the Ft. Worth case and find that the Defendant knew that Williams was under the influence of intoxicating liquor and was a passenger in the front

seat of the car and find him guilty under that Ft. Worth case. In view of the Defendant's testimony and the fact that he was not driving himself I am going to assess a $75.00 fine and three days in the County Jail."

The "Ft. Worth case" referred to in the findings of the court is shown to be Joiner v. State, 161 Tex. Cr. R. 526, 279 S. W. 2d 333, wherein we said:

"It is now the settled law in this State that the owner of an automobile who permits another whom he knows to be intoxicated to drive the same while he is a passenger therein may be criminally responsible for the acts of the driver, provided there is shown the existence of the elements necessary to constitute him a principal. Brewer v. State, 140 Tex. Cr. R. 9, 143 S. W. 2d 599 * * *"

The pertinent facts from the standpoint of the defense are quoted from his brief: "Sometime after 7 P. M., Tuesday, April 7, 1964, George Williams, the helper of the Appellant Marble Setter arrived at Doc's Drive-Inn on Second Avenue, Dallas, Texas. While at Doc's, Williams telephoned Appellant at his home requesting to borrow one of the Appellant's two automobiles as he had frequently in the past. Appellant arrived at Doc's with the vehicle at approximately 8:15 P. M., whereupon Appellant and Williams in the ensuing approximate 1 1/2 hours had 2 or 3 beers each. At that time, approximately 9:45 P. M., Appellant and Williams, left Doc's Drive-Inn for the purpose of taking Appel-

lant to his home. Appellant allowed Williams to drive his automobile. Williams drove along Second Avenue for approximately 3 miles to Fern Street. Approximately 3 to 4 blocks before the automobile got to Fern Street, Officers Livingston and Shaffer in an unmarked squad car first noticed and followed Appellant's vehicle at an approximate distance of one block. At Fern Street Appellant's vehicle made a sudden turn to the left, proceeded approximately 40 feet and in attempting a 'U' turn drove off the roadway, hit the culvert and went into the ditch. Officers Livingston and Shaffer arrived at the scene shortly thereafter and found the Appellant at the steering wheel attempting to drive his vehicle out of the ditch. At this point the officers determined both Appellant and Williams were intoxicated. After several unsuccessful attempts by Appellant to drive the automobile out of the ditch, Appellant and Williams both got out of the automobile and the officers placed them under arrest."

Appellant testified that the reason he allowed Williams to drive his automobile from the Drive-Inn rather than drive it himself was that he "wanted to see if he had had too much to drink to take the car out."

"Q. Did you have suspicions in your mind that he might be a little loaded?

"A. Well, I didn't know how long he had been there, and I didn't want to let the car go out if he had had too much to drink.

"Q. If he had had too much would you have told him no?

"A. Yes, I would have told him no.

"Q. Well, do you feel like he had had too much to drink out there?

"A. No, I don't think he had had too much.

"Q. Did he handle the car all right?

"A. He seemed to handle it fine."

To the contrary, the state's evidence was that the car was being driven in a dangerous or hazardous manner, weaving from lane to lane. This, the officers testified, was what attracted their attention and caused them to pursue the car until it went into the ditch.

We find the evidence sufficient to sustain a finding by the trial judge that appellant knew that Williams was under the influence of intoxicating liquor and permitted him to drive his car on a public street.

The evidence is also sufficient to sustain a finding that appellant drove his automobile upon a public street and into the culvert and ditch while intoxicated.

Either of such findings is sufficient to sustain the judgment of the trial court finding appellant guilty of "driving a motor vehicle upon a public road in Dallas County, Texas, while under

the influence of intoxicating liquor," as charged in the information.

"The mere fact that a decision was given for a wrong or insufficient reason will not result in a reversal since, if the decision is correct on any theory of law applicable to the case, it will be sustained."

5 Tex. Jr. 2d 606, Appeal and Error--Criminal, Sec. 402; Washington v. State, 91 Tex. Cr. R. 546, 239 S. W. 961; Fields v. State, 160 Tex. Cr. R. 498, 272 S. W. 2d 120.

The judgment is affirmed.